Supreme Court, U.S.
FILED
DEC 23 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

TABLE OF AUTHORITIES

Cases: Page

Aberdeen & R. R.R. v. *ICC*, 682 F.2d 1092, petitions for cert. pending, Nos. 82-707, 82-804 ..... 11, 12

American Trucking Ass'n, Inc. v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 9-10

Berwind-White Coal Mining Co. v. *Chicago & E. R.R.*, 235 U.S. 371 7

Davis v. *Portland Seed Co.*, 264 U.S. 403 7

Hewitt-Robins, Inc. v. *Eastern Freight Ways, Inc.*, 371 U.S. 84 11

Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 5

Lamb-Fish Lumber Co. v. *Yazoo & M.V.R.R.*, 42 I.C.C. 470 7

Middlewest Motor Freight Bureau v. *United States*, 433 F.2d 212 12

Municipal Light Boards v. *FPC*, 450 F.2d 1341, cert. denied, 405 U.S. 989 2

Nashville Traffic Bureau v. *Louisville & N. R.R.*, 53 I.C.C. 37 7

Reclassification of Pork Skins & Bacon Rinds, NMFC (ICC I&S Docket No. M-30360) (Aug. 4, 1982) pending review *sub nom. National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.) 5-6

Shobe, Inc. v. *Bowman Transportation, Inc.*, 350 I.C.C. 664 6

Transit on Wheat Between Reshipping Point & Destination, 365 I.C.C. 890 ..... 11, 12

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 2

Western Coal Traffic League v. *United States*, No. 81-4257 (5th Cir. Nov. 14, 1983) 5

Statutes and regulation:

Motor Carrier Act of 1980, 49 U.S.C. (Supp. V) 10101 *et seq.* 6

49 U.S.C. (Supp. V) 10321(a) 2

49 U.S.C. (Supp. V) 10704 5

49 U.S.C. (Supp. V) 10704(b)(1) 4

Statutes and regulation—Continued: Page

49 U.S.C. (Supp. V) 10706 2
49 U.S.C. (Supp. V) 10708 ..... 4, 5
49 U.S.C. (Supp. V) 10762 ..... 2, 4
49 U.S.C. (Supp. V) 10762(e) 1, 2, 3
49 U.S.C. (Supp. V) 11701 6
49 U.S.C. (Supp. V) 11705(a) 11
49 U.S.C. (Supp. V) 11705(b)(3) 4
49 U.S.C. (Supp. V) 11901(b) 4
49 U.S.C. (Supp. V) 11914(a) 4
49 U.S.C. (Supp. V) 11914(b) 4
Reed-Bulwinkle Act, 49 U.S.C. (Supp. V) 10706.... 2, 8
49 U.S.C. (Supp. V) 11706(b)(3)(B)(v) 7
49 C.F.R. 1300.2(a)(1) 10

Miscellaneous:

Ex Parte No. 370, *Tariff Improvement*, 44 Fed. Reg. 60122 (1980), upheld, *Aberdeen & R. R.R.* v. *ICC*, 682 F.2d 1092, petitions for cert. pending, Nos. 82-707, 82-804 10
H.R. Rep. 1100, 80th Cong., 1st Sess. (1947) 5, 8
H.R. Rep. 96-1609, 96th Cong., 2d Sess. (1980) 3, 9
S. Rep. 96-641, 96th Cong., 2d Sess. (1980) 3, 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1643

INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In our opening brief we argued that where a motor carrier rate filed with the ICC seriously violates an approved rate bureau agreement, the Commission does not lose the power to reject the rate under 49 U.S.C. (Supp. V) 10762(e) as unlawful ab initio (and thus to create a basis for overcharge liability) solely because the violation was not immediately discovered and the rate has gone into effect. Respondents and amici Aberdeen and Rockfish Railroad Company present several responses warranting a brief reply.

1. Respondents raise two preliminary arguments that would restrict the Commission's enforcement

powers far more severely than the holding below, which merely limited the ICC's rejection authority under Section 10762(e) to rates that were not yet effective.

a. Respondents first argue (Resp. Br. 14-19) that the Commission may enforce compliance with rate bureau agreements only by withdrawing its approval of the bureau agreements—a remedy expressly conferred by Section 10706 of the Act. Under this theory the ICC may not suspend a tariff that clearly violates a rate bureau agreement even *before* it becomes effective. This argument was correctly rejected by the court below (Pet. App. 24a-28a). Nothing in Section 10706 suggests that it constitutes the sole sanction available to the Commission; nor is Section 10321(a), which broadly authorizes the Commission to adopt regulations to carry out the Act, made inapplicable to the rate bureau provisions. Accordingly, the Commission has ample statutory authority to adopt enforcement sanctions other than disapproval of rate bureau agreements.[1]

b. Second, respondents repeat the assertion (Resp. Br. 19-22)—rejected by the court of appeals (Pet. App. 25a-26a)—that Section 10762's delegation of power to reject tariffs is limited to cases where there is a defect in the *form* of the tariff filing. But the decision below followed law settled by this Court, as well as elsewhere, in holding that the Commission may reject tariffs for substantive as well as formal procedural violations of the Act. *E.g.*, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

---

[1] The court of appeals correctly found (Pet. App. 7a) that Congress did not, as respondents claim (Resp. Br. 15, 19),

2. With regard to the specific issue presented in this case—the scope of the Commission's rejection authority under Section 10762(e)—respondents' and amici's legal arguments reduce to two: first, that overcharge liability based on rejection of effective rates is inconsistent with the statutory remedial scheme created by Congress; and, second, that the ICC's assertion of a power to reject effective rates conflicts with the Commission's prior interpretation of its authority under the Act.

a. Respondents and amici argue broadly (Resp. Br. 23-24; Amici Br. 10-14) that using the rejection power to invalidate effective rates would be inconsistent with other enforcement mechanisms available under the Act; they conclude that Congress could not have intended the Commission to exercise this authority. But the Commission found, in adopting the rejection rule, that the alternative remedies do not do the job of effectively policing compliance with rate bureau agreements.

First, it must be remembered that a rate formulated in violation of an agreement may nevertheless still be nondiscriminatory and within the zone of rea-

---

"virtually eliminate[] the ICC's legislative rulemaking authority over rate bureau agreements" when it adopted the 1980 Act. In their discussions of the new Section 14, neither the House nor the Senate reports contain any criticism of the Commission's exercise of its authority to approve rate bureau agreements under the earlier statutes. H.R. Rep. 96-1069, 96th Cong., 2d Sess. 27-30 (1980); S. Rep. 96-641, 96th Cong., 2d Sess. 12-15, 30-32 (1980). Moreover, with regard to enforcement, Congress made no effort to limit the Commission's authority over "the processing of loss, damage, and overcharge claims in order to protect the public interest." Indeed, Congress expressly stated its intention "that this legislation [the 1980 Act] not weaken the interest and protection of shippers." H.R. Rep. 96-1069, *supra*, at 40.

sonableness. Consequently, a shipper challenging such a rate may be unable to show damages—necessary to justify reparations under 49 U.S.C. (Supp. V) 11705(b)(3)—even though the rate violates a rate bureau agreement.

Second, the suspension power (49 U.S.C. (Supp. V) 10708)—which is expressly limited to proposed tariffs—is ineffective because the Commission lacks the resources to examine all tariff filings for compliance with rate bureau agreements. Moreover, while shippers typically have both the incentive and the capacity to discover whether tariff filings contain rates that exceed the maximum or that discriminate, they are unlikely to uncover within the preeffective period the antitrust implications lurking behind a filing that violates a rate bureau agreement.

A third alternative remedy—prescription (see 49 U.S.C. (Supp. V) 10704(b)(1))—is prospective only, and, like the damages remedy, is relevant only if a rate is shown to be unreasonably high. The fourth alternative—cancelling an unlawfully established tariff for the future—is also prospective. Since it would allow carriers to retain charges already collected under an unlawful rate, it has little deterrent value.

Finally, contrary to amici's assertion (Amici Br. 13), the penalty provisions of the Act do not create a comprehensive response to the rate bureau problem. Section 11901(b) authorizes civil penalties of only $500 for each violation of Section 10762 and $25 for each day the violation continues. Criminal penalties (see 49 U.S.C. (Supp. V) 11914(a) and (b)) can only be assessed if violations are willful and if the government can prove beyond a reasonable doubt that a violation occurred.

Amici also argue that antitrust liability (see Amici Br. 13, n.23) is a "powerful" and adequate deterrent.

But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). More important, the *Commission* has no power to bring claims against carriers for violations of the antitrust laws. It is critically important that the Commission—the body Congress expressly designated to enforce members' compliance with approved agreements—have the power to impose sanctions for non-compliance. See Pet. App. 24a-25a; *Western Coal Traffic League* v. *United States*, No. 81-4257 (5th Cir. Nov. 14, 1983) slip op. 705-706 n.10; H.R. Rep. 1100, 80th Cong., 1st Sess. 4-6 (1947) (ICC is "the agency which is peculiarly well-qualified" to balance the requirements of the national transportation policy and the limitations of the antitrust laws as required by the Reed-Bulwinkle Act).

In sum, the rejection remedy, sensitively used, is best suited to the task of enforcing compliance with rate bureau provisions. This remedy does not overlap with other sanctions and does not render them superfluous.[2]

---

[2] There is no merit to respondents' claim (Resp. Br. 11, 24) that the rejection of effective tariffs makes superfluous the Commission's investigation and suspension authority in 49 U.S.C. (Supp. V) 10704 and 10708, because the Commission "would not need authority to suspend proposed tariffs or order existing rates cancelled retroactively." The Commission has and will continue to use its suspension authority in Section 10708 where a violation of an agreement is shown prior to a tariff's effective date. Similarly, the Commission will use its authority in Section 10704 to prescribe rates for the future—or order a carrier to end a violation—if the violation is not serious enough to merit rejection and if the prerequisites to use of Section 10704 apply. See J.A. 9; Pet. App. 78; *Reclassification of Pork Skins & Bacon Rinds*, NMFC (ICC I&S

b. Although amici concede (Amici Br. 23) that the Commission has on occasion rejected effective common carrier tariffs in the past, respondents and amici assert (Resp. Br. 25-38; Amici Br. 17, 21-27) that the rejection of effective tariffs would constitute a radical departure from past Commission practice and policy. They argue that the authority so to reject should be denied on that ground. They rely (Amici Br. 22; Resp. Br. 25) in particular on cases where the Commission has held that tariffs that are in effect, but which contain technical publishing errors, nevertheless constitute the applicable tariffs, and that carriers are not subject to overcharges for charging rates pursuant to these tariffs. See, *e.g.*, *Shobe, Inc.* v. *Bowman Transportation, Inc.*, 350 I.C.C. 664 (1975).

In fact these cases bear little relationship to the issue involved here—whether the Commission may

---

Docket No. M-30360) (Aug. 4, 1982), pending review *sub. nom. National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.). Rejection is an alternative remedy designed to apply where suspension is no longer possible and where the Commission believes the violation is serious enough to warrant rejection rather than merely cancellation for the future.

Nor is there a basis for the assertion that the rejection of effective tariffs is contrary to the "goals of promoting certainty and protecting reliance on the filed tariff rates" (Amici Br. 15-16). As we explained in our opening brief (Gov't Br. 33-34), the Motor Carrier Act of 1980, 49 U.S.C. (Supp. V) 10101 *et seq.*, has reduced the prior emphasis on rate uniformity by encouraging increased competition and a variety of quality and price options to shippers. Moreover, even if tariff uniformity were still a primary statutory goal, the Commission's rejection sanction would not undermine that goal any more than does the complaint procedure expressly provided in 49 U.S.C. (Supp. V) 11701. That section permits a challenge to rates at *any* time.

reject effective tariffs reflecting significant violations of motor carrier rate bureau agreements. The decisions cited by respondents and amici reflect the ICC's judgment that, ordinarily, carriers and shippers can protect themselves from tariffs that are too low or too high or discriminatory. So long as the tariff is published and is properly symbolized, the "injured" party is normally on notice—and thus there is, in an ordinary case, no public interest to be served by retroactive invalidation of that tariff. See *Lamb-Fish Lumber Co.* v. *Yazoo & M.V.R.R.*, 42 I.C.C. 470, 471 (1916) (carriers' published rate too low); *Nashville Traffic Bureau* v. *Louisville & N. R.R.*, 53 I.C.C. 37, 38 (1919) (carriers published rate too high).[3] But if the carrier consciously attempts, for instance—in violation of 49 U.S.C. (Supp. V) 10706(b)(3)(B)(v)—

[3] Respondents and amici argue (Resp. Br. 35-36; Amici Br. 24-27) that this Court has upheld the Commission's interpretation of the statute as denying it the authority to reject effective tariffs. But neither decision holds that rejection can never be employed against effective rates. In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), the Court held that the alleged informalities at issue there were not grounds for invalidation of the tariff since the shipper had received notice of the rates to be charged. The Court had no occasion to discuss and certainly did not hold that a tariff can never be nullified after it has gone into effect.

As we explained in our opening brief (Gov't Br. 28-29), the Court in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), did not hold that the Commission is prohibited from rejecting an effective tariff containing a significant violation of a rate bureau agreement. In *Davis*, the issue was whether, absent Commission intervention, the shipper could automatically remedy violations of the long and short haul clause by using the lower tariff as a rate ceiling. The court held that it could not. Here, in contrast, the issue is whether *the Commission* can efface an illegally published rate in the exercise of its discretion to select appropriate remedies.

to conceal its identity as the entity that proposed a rate increase in order to shield itself from economic pressures by shippers and possibly to cover up other illegalities in the way the rate was arrived at, neither shippers nor the Commission would be able to uncover such a violation or its consequences immediately. Under respondents' theory, if the carrier can conceal its illegality for 30 days, it receives the benefit of a tariff that Congress clearly intended to be unlawful, and the Commission is left with an inadequate weapon to protect the public interest. With the rejection power available, not only will the carrier not benefit from the illegal tariff, but also more carriers will simply choose to comply with the requirements of the agreement.

It is noteworthy that neither respondents nor amici cite any cases involving the Commission's policing of the antitrust immunity conferred on rate bureaus by the Reed-Bulwinkle Act in 1948. As we discussed previously, when Congress delegated to the ICC enforcement of the uneasy balance between national transportation policy and antitrust prohibitions, it acknowledged that this regulatory responsibility was quite different from the regulatory role theretofore performed by the Commission. The ICC was here charged with the duty to make certain that the carriers' "relief from the antitrust laws" was warranted by a finding of the Commission that immunity was in "furtherance of the national transportation policy." H.R. Rep. 1100, *supra*, at 5. This obligation was renewed by Congress in 1980 in the Motor Carrier Act, with the admonition that the interests of shippers were to be protected. In fact, it was a major function of Section 10706 to increase competition among carriers by spelling out strict limits on the

permissible scope of collective ratemaking (H.R. Rep. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. 96-641, *supra*, at 13-14). Because Congress went to elaborate lengths to assure that exceptions to the antitrust laws be limited to specifically described categories of action, collective ratemaking should be confined to situations where the carriers have complied scrupulously with the terms of Commission approved agreements. An administrative sanction that will effectively assure such compliance is essential to effective implementation of the statute. The Commission's rejection rule is the logical means of implementing the principle that carriers are not entitled to collect rates that defy the antitrust laws because they reflect serious rate bureau violations.

Since the regulatory problems posed by enforcing the antitrust immunity are often different from those posed by the ICC's traditional role of regulating tariffs, there is no basis for concluding that a remedy thought in a particular case to be unnecessary in the latter context is automatically unnecessary in the former. As previously mentioned, violations of rate bureau agreements are often a highly "invisible" form of violation, not readily apparent to shippers; it is thus perfectly plausible to insist on additional remedial tools to deal with them. In any event, the fact that the Commission has, in some circumstances, refused to assess overcharges for tariff defects in the past simply does not establish that the Commission lacks authority to announce that it will do so in appropriate cases in the future. Thus, to the extent that the rejection rule represents a change in policy, the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'n,*

Inc. v. *Atchison T. & S.F. Ry.*, 387 U.S. 397, 716 (1967). This regulation was adopted in response to the Commission's particular enforcement obligations and capacities as these exist today. This constitutes precisely the type of "change" an agency is justified in announcing through the rulemaking process.

3. Finally, respondents and amici assert (Resp. Br. 38-44; Amici Br. 10-11) that a ruling that the ICC has rejection power will give rise to a parade of horrors. But the horrors are imaginary. They are based largely on hypothetical applications of the "symbolization" rule at issue in *Aberdeen & R. R.R. Co.* v. *ICC*, petitions for cert. pending, No. 82-707 and 82-804 [4]—applications that are inconsistent with the

---

[4] Ex Parte No. 370, *Tariff Improvement*, 44 Fed. Reg. 60122 (1980), upheld, *Aberdeen & R. R.R.* v. *ICC*, 682 F.2d 1092 (5th Cir. 1982) petition for cert. pending, Nos. 82-707, 82-804. For an explanation of the Commission's symbolization rule, see No. 82-707 and 82-804, Brief for the Federal Respondents at 2-5.

Amici attempt (Amici Br. 11) to minimize the importance of tariff symbols and to suggest that shippers suffer no adverse consequences from missymbolized rate increases. These assertions are incorrect. The symbolization rules are an integral part of the Commission's program for effective enforcement of the tariff provisions that form the core of the Interstate Commerce Act. As intervening respondents themselves concede (Amici Br. 3), the Act allows "shippers [to] challenge proposed rates." To achieve this "protection for shippers" (*ibid.*), the Commission's filing regulations long have required that all tariffs bear appropriate symbols to indicate whether the tariff increases, decreases, or causes no increase or decrease in existing rates (49 C.F.R. 1300.2(a)(1)). Because tariffs are long and detailed, symbols provide the only practical way for shippers to learn of rate increases in time to exercise their statutory right to protest and seek suspension of those increased rates. If users could not rely on accurate symbols they would have to compare hundreds of thousands of proposed tariff filings each year against existing tariffs. It was to protect tariff users against deprivation—by missymbolization—

regulation as written and interpreted by the Commission. The regulation does not require automatic rejection of a tariff whenever the carrier has violated a rate bureau agreement or missymbolized a tariff. Insubstantial violations, such as those cited by respondents and amici, are not what the rejection rule is designed to remedy.

In the only case applying the new rejection authority, the Commission held that in the specific circumstances of that case the rate bureau violation at issue did not warrant rejection. See *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890 (1982). The *Transit* case thus shows that respondents' and amici's fears about harsh or unfair applications of the rejection remedy are unfounded; in motor carrier cases (as well as rail carrier cases) the ICC will use its discretion to reserve the refund remedy to cases of "serious violations." See *Aberdeen & R. R.R.* v. *ICC*, 682 F.2d at 1105. Moreover, rejection decisions always will be preceded by a hearing and are subject to judicial review (*ibid.*).[5] Thus, Amici's hypothetical concerns can be

---

of their right to protest rate increases, that the Commission announced its intention, in appropriate cases, to invalidate and make uncollectible improperly symbolized increases and allow shippers to recover amounts already paid as overcharges.

[5] As respondents observe (Resp. Br. 43), the Commission does not itself award overcharges to shippers via motor carrier; to obtain damages on the basis of a Commission rejection order, a shipper will have to bring a civil action in the district court (see 49 U.S.C. (Supp. V) 11705(a)). The statutory scheme thus provides substantial protection for motor carriers. If a court does not believe that the carrier should bear overcharge liability in a particular case, it will not require refunds. See *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*,

corrected by judicial review of specific uses of the rejection power; they provide absolutely no basis for striking down the Commission's rule on its face.[6]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel
Interstate Commerce Commission

DECEMBER 1983

---

371 U.S. 84 (1962); *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (8th Cir. 1970).

These various safeguards in the statute and regulation will protect carriers if, as respondents' fear (Resp. Br. 41-42), the Commission penalizes carriers that could not know in advance the effect of a particular tariff change, or if shippers simply wait until the end of the three year statute of limitations period before indicating that a particular tariff was missymbolized. See *Aberdeen and R. R.R.* v. *ICC*, *supra*, 682 F.2d at 1105.

[6] Respondents incorrectly assert (Resp. Br. 35) that the Commission acts unfairly because it treats motor carriers who violate rate bureau agreements more harshly than it does rail carriers. The ICC has held that "actual harm" or other "considerations" must be shown in order to warrant the rejection remedy where shippers allege that a rail tariff violated an approved rate bureau agreement. See *Transit on Wheat Between Reshipping Point and Destination*, *supra*, 365 I.C.C. at 898-899. The *Transit* holding was, however, based "on the circumstances of [that] case," (*id.* at 900) and although the Commission found in *Transit* that shippers had not made a compelling enough demonstration to warrant a refund, the ordering of refunds in future cases remains discretionary, *both* in railroad and motor carrier cases.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 429283 210